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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No._____

HARVEY GEORGE DeROSIER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, HARVEY G. DeROSIER, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on February 18, 1955.

OPINIONS BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals, (Holmes and Borah, Cir-

cuit Judges) has not yet been reported and is printed in this Petition as Appendix A. No opinion was rendered by the Court of Appeals on the denial of Petitioner's Petition for Rehearing.

GROUNDS OF CONCLUSION

On January 18, 1955, the Court of Appeals affirmed the judgment of conviction theretofore entered by the United States District Court of the Southern District of Florida. On February 5, 1955 the Petitioner filed his Petition for Rehearing with the Court of Appeals. On February 18, 1955 the Petition for Rehearing was denied by the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where the administrative regulations governing the federal employees loyalty program require that the answer, if any, of a federal employee to a "notice of proposed removal action" shall be filed with the departmental loyalty board located in Washington, D. C., is the making of false statements in such answer filed by such employee an offense which is indictable only in the judicial district embracing the place fixed by regulations for filing such answer?

2. May a District Court instruct a jury that they can find a certain organization to be a Ku Klux Klan organization within the definition of any of the organizations designated by the attorney general as subver-

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sive where no definition of the said organizations so designated was presented to the jury by the evidence or the Court's instructions?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions, statutes and regulations involved in this case are set forth in Appendix B to this Petition.

STATEMENT OF THE CASE

On December 9, 1952 an indictment consisting of two counts charging violations of 18 U.S.C. 1001 was returned against the Petitioner. The first count of the indictment set forth that the Post Office Loyalty Board was a branch of the United States Post Office charged with the duty of administering the Federal Employees Loyalty Program and that the Petitioner, as an employee of the Post Office Department, was subject to the jurisdiction of the Post Office Department Loyalty Board. The indictment further set forth that under the said Loyalty Program membership in various organizations designated as subversive by the attorney general was one of the factors involved in determining the loyalty of federal employees and "that the Ku Klux Klan and various of its branches were among the organizations declared to be subversive by the attorney general of the United States, and the John B. Gordon Klavern was a Ku Klux Klan organization, affiliated at various times with the Association of Georgia Klans and with the Southern Knights of the Ku Klux Klan". (Tr. 2) It was charged that on or about July 12, 1951 the said Loyalty Board commenced an inquiry into

the alleged membership of the Petitioner in the said John B. Gordon Klavern by presenting the Petitioner with a "Notice of Proposed Removal Action." It is then charged that the Petitioner, at Hialeah in the Southern District of Florida and within the jurisdiction of the District Court, made false statements and representations to the said Loyalty Board in a matter within the jurisdiction of the said Board, to-wit, the inquiry by the Board concerning the membership of the Petitioner in the John B. Gordon Klavern, in that the Petitioner prepared an answer to the said "Notice of Proposed Removal Action", "which said answer was forwarded to and filed with the said Post Office Department Loyalty", (Tr. 3) and which said answer contained false and fraudulent statements by the Petitioner pertaining to his activities with the John B. Gordon Klavern. The indictment did not charge that the Petitioner was a member of the John B. Gordon Klavern at the time of the inquiry of the said Loyalty Board but charged "That the said defendant attended meetings of the John B. Gordon Klavern held at Sports, Inc., in Hialeah, Florida from the time of his initiation throughout the year 1950, and well into the year 1951." (Tr. 4)

The second count of the indictment charged that the Petitioner had, within the jurisdiction of the District Court, made and used a false document in a matter within the jurisdiction of the Post Office Department Loyalty Board, to-wit, the inquiry of the said Board into the membership of the Petitioner in the John B. Gordon Klavern and that the false document prepared by the Petitioner "was forwarded by him to the aforesaid Post Office Department Loyalty Board at Washington, D. C."

The Petitioner moved to dismiss the indictment upon

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the grounds that the indictment failed to state an offense and that the District Court was without jurisdiction because the offense, if any, was cognizable only in the judicial district in and for the District of Columbia. (Tr. 8) The motion to dismiss was denied (Tr. 10) and the case proceeded to trial.

In the trial the evidence showed that the attorney general of the United States had designated as subversive the following organizations:

Associated Klans of America
Association of Georgia Klans
Ku Klux Klan
Original Southern Klans, Inc.

The government's evidence was that the John B. Gordon Klavern had at one time been affiliated with the Association of Georgia Klans, had then become an independent organization and had later become affiliated with the Southern Knights of the Ku Klux Klan, an organization which does not appear on the attorney general's list of subversive organizations. There was no evidence presented that the John B. Gordon Klavern was ever associated with an organization known as the Ku Klux Klan. No evidence was presented to define the organizations designated by the attorney general as subversive.

At the conclusion of the government's case the Petitioner moved for the entry of a judgment of acquittal and renewed such motion at the close of all the evidence. The grounds of the Petitioner's motion were, among others, that the evidence was insufficient to show membership or affiliation of the Petitioner with any organ-

ization designated as subversive and further that the evidence was insufficient to show that any crime had been committed within the jurisdiction of the District Court. The motion for judgment of acquittal was denied.

The Court charged the jury that if they found that the John B. Gordon Klavern mentioned in the indictment was a Ku Klux Klan organiaztion within the definition of any of the organizations included in the attorney general's list of subversive organizations then the Post Office Loyalty Board had jurisdiction to make a proper inquiry of the Petitioner concerning his membership in it.

The jury returned a verdict of guilty on both counts. The motions of the Petitioner for judgment of acquittal or for new trial, and for arrest of judgment were denied by the Court. Judgment of conviction was entered and the Petitioner filed his notice of appeal to the Court of Appeals for the Fifth Circuit. On January 18, 1955 the Court of Appeals for the Fifth Circuit affirmed the said judgment of conviction entered by the District Court. Circuit Judge Holmes wrote the opinion in the case which was concurred in by Circuit Judge Borah. Circuit Judge Russell took no part in the opinion due to illness.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The decision of the Court of Appeals for the Fifth Circuit sought to be reviewed is in conflict with the decision of the Court of Appeals for the Third Circuit in **United States v. Valenti, 207 F. 2d 242 (3rd Cir., 1953),** holding that where regulations require the filing of a document with public officials the offense of making false

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statements in such document is committed only at the place fixed for filing and is not commenced at the place of mailing.

2. Each of the questions presented herein embody questions of federal law which have not been, but should be, settled by this Court.

3. The decision of the Court of Appeals for the Fifth Circuit appears to be in conflict with the decision of this court in **United States v. Lombardo, 241 U.S. 73, 36 S.Ct. 508, 60 L.Ed. 897 (1916).**

ARGUMENT

QUESTION I

WHERE THE ADMINISTRATIVE REGULATIONS GOVERNING THE FEDERAL EMPLOYEES LOYALTY PROGRAM REQUIRE THAT THE ANSWER, IF ANY, OF A FEDERAL EMPLOYEE TO A "NOTICE OF PROPOSED REMOVEL ACTION" SHALL BE FILED WITH THE DEPARTMENTAL LOYALTY BOARD LOCATED IN WASHINGTON, D. C., IS THE MAKING OF FALSE STATEMENTS IN SUCH ANSWER FILED BY SUCH EMPLOYEE AN OFFENSE WHICH IS INDICTABLE ONLY IN THE JUDICIAL DISTRICT EMBRACING THE PLACE FIXED BY REGULATIONS FOR FILING SUCH ANSWER?

Under the provisions of Article 3 §2 Clause 3 of the

United States Constitution (Appendix B, infra) the trial of a crime shall be held in the state where the said crime has been committed. Thus, it is elementary that a district court has no jurisdiction to try a crime unless the crime was committed in the state in which that district is located. In order to determine the jurisdiction of a district court, therefore, it is necessary to ascertain where the crime was committed. It is of course possible for a crime to consist of several distinct parts and also to have a continuity of performance which would give jurisdiction to a district court in any state where any part of the crime was committed. The charge in the present case is that the Petitioner prepared an answer to a notice of proposed removal action, which answer contained false statements, and forwarded the said answer to the Post Office Loyalty Board in Washington, D. C. If the crime consisted of the preparation and mailing of such a false answer then the district court of the Southern District of Florida would have jurisdiction to try the offense. If the crime consisted only of the filing of a false answer with the Post Office Loyalty Board in Washington, D. C., then only the district court embracing Washington, D. C. had jurisdiction to try the Petitioner. Therefore the question presented is simply a question of where was the crime committed.

It has been recognized that a crime may lack continuity of performance and may consist of a single act which occurs at one time and at one place, and if such is the case, at which place only it may be tried, although preparation for its commission may take place elsewhere. **Reass v. United States, 99 F. 2d 752 (4th Cir. 1938).** In the category of such offenses are those which involved the filing of documents or reports at a designated office.

Thus, where a statute required that a return "shall be made" to the collector of Internal Revenue in Baltimore, the mere placing of a return in the mail in Washington, D. C. for delivery to the collector in Baltimore was not a compliance with such a statute. **Wampler v. Snyder, 62 App. D. C. 215, 66 F. 2d 195.** Also, in an action involving an indictment under 18 U.S.C. 1001 charging the defendant with making false representations to the War Assets Administration located in New York City, it was held, in **U. S. v. Borow, 101 F. Supp. 211 (D.C.N.J. 1951),** that the gist of the offense was that the defendant made false representations to the War Assets Administration and that such an alleged crime consisted of one single act, that is, the delivery to the government official in New York City of the letter containing the false statements, and that no crime was committed merely in the preparation of his letter in New Jersey absent its delivery.

This court has considered the question involved in the case of **United States v. Lombardo, 241 U. S. 73, 36 S.Ct. 508, 60 L.Ed. 897 (1916),** and specifically held that where the gist of the offense involved the filing of a document with a public official, the offense is committed at the place fixed for the filing, and is not a continuing offense commencing at the place from which the document is mailed. This court stated,

> "A Court is constrained by the meaning of the words of a statute. They mark the extent of its power, and our attention has not been called to any case which decides that the requirement of a statute, whether to secure or preserve a right or to avoid the guilt of a crime, that a paper shall be filed with a particular officer, is

satisfied by a deposit in the post office at some distant place."

It is evident from the above quoted language of this court that the holding of the Court of Appeals for the Fifth Circuit in the case sought to be reviewed, which holding was that the Petitioner was properly tried in the district where only the acts of preparation and mailing could have occurred, is in conflict with the holding of this court in **United States v. Lombardo, supra.**

The Court of Appeals for the Third Circuit has recently, in the case of **United States v. Valenti, 207 F. 2d 242 (3rd Cir. 1953),** passed upon the question involved. In that case the defendant was indicted in the district court of New Jersey on a charge of making a false statement in a non-communist affidavit submitted to the National Labor Relations Board, which document could only be filed with the National Labor Relations Board in either Philadelphia or Washington. The Court determined that they must look to the jurisdiction of the National Labor Relations Board in order to determine where the offense was committed. The court found that under Section 9(h) of the Labor Management Relations Act the officer of a union may place on file with the Board the non-communist affidavit described in that section and that, upon the filing of such an affidavit with the Board, the Board would then act upon it.

The Court then considered that the only act which constituted a crime was the actual filing of the non-communist affidavit with the Board. The Court said, on page 244 of its opinion,

"It will thus be seen that the act having legal significance is the filing of the non-communist affidavit with the Board. Until the affidavit has been delivered to the Board to be placed "on file" it has had no legal effect whatsoever. Until then the Board is not empowered to deal with it or to act in the light of it; it is therefore not yet a matter which has come within the jurisdiction of the Board. It follows that the crime denounced by Section 1001 of Title 18, read in the light of Section 9(h) of the National Labor Relations Act, is the act of filing of false non-communist affidavit with the National Labor Relations Board and not the act of signing such affidavit or swearing to its truth. While the matter may constitute the crime of perjury under state law, a false statement has not been made within the jurisdiction of the National Labor Relations Board within the meaning of Section 1001, until the affidavit through its filing has become the basis for action by the Board. Compare Reass v. U. S. (4th Cir. 1938), 99 F. 2d 752, and U. S. v. Borow, D.C.N.J. 1951, 101 F. Supp, 211, in which similar conclusions were reached under analogous statutes."

On page 245 the Court stated:

"It follows, therefore, that the actual filing of a false affidavit with the Board is necessary to constitute the crime denounced by Section 1001 and that constructive filing by delivery to the Post Office is not enough."

In the case which is sought to be reviewed by this Court the applicable administrative regulations (**5 C.F.R. 1949 Edition,** Appendix B, infra) contemplated, indeed required, that the answer, if any, of a federal employee to a notice of proposed removal action shall be filed with the Loyalty Board in Washington, D. C. The regulations further provided that if such an answer is filed with the Board then the Board shall act upon such answer. Not only was the Petitioner required by regulations to file his answer with the Board in Washington but he was specifically directed by the Loyalty Board that "your answer should be addressed to the Loyalty Board of the Post Office Department, hereinafter referred to as the Board, and sent to E. B. Jackson, Chairman, Room 4406, Post Office Department, Washington 25, D. C." (Tr. 163) In view of such requirements the principle established by this Court in **United States v. Lombardo, supra,** and reiterated by the Court of Appeals for the Third Circuit in **United States v. Valenti, supra,** is applicable. The Petitioner was required by regulations to file his answer with the Board in Washington. Until such time as the answer was filed with the Board it did not constitute a matter within the jurisdiction of the Loyalty Board and no crime was committed until the answer was filed. The gist of the offense was the filing of a false answer with the Loyalty Board in Washington, D. C. Constructive filing by delivery to the Post Office for mailing was not sufficient in either **United States v. Lombardo, supra** or **United States v. Valenti, supra,** and the Petitioner contends that it was not sufficient to give the district court jurisdiction to try the case sought to be reviewed.

It is submitted that the holding of the Court of Appeals for the Fifth Circuit that the district court had

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jurisdiction to try the Petitioner is in conflict with the holding of this Court in **United States v. Lombardo, supra,** and the holding of the Court of Appeals for the Third Circuit in **United States v. Valenti, supra.**

QUESTION II

MAY A DISTRICT COURT INSTRUCT A JURY THAT THEY CAN FIND A CERTAIN ORGANIZATION TO BE A KU KLUX KLAN ORGANIZATION WITHIN THE DEFINITION OF ANY OF THE ORGANIZATIONS DESIGNATED BY THE ATTORNEY GENERAL AS SUBVERSIVE WHERE NO DEFINITION OF THE SAID ORGANIZATIONS SO DESIGNATED WAS PRESENTED TO THE JURY BY THE EVIDENCE OR THE COURT'S INSTRUCTIONS?

This question presents an important question as to the application and interpretation of the list of organizations designated by the attorney general as subversive. This Court has given consideration to the list of the attorney general in **Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 95 L.Ed. 817, 71 S.Ct. 624.** In this case, Supreme Court Justice Douglas observed on page 176,

> "The charge that these organizations are 'subversive' could be clearly defined. . .
>
> "No one can tell from the executive order what meaning is intended. No one can tell from the records of the cases which one the attorney general applied. The charge is flexible; it will mean one thing to one officer, another to someone else."

And, on page 178,

> The system used to condemn these organizations is bad enough. The evil is only compounded when a government employee is charged with being disloyal. Association with or membership in an organization found to be 'subversive' weighs heavily against the accused. He is not allowed to prove that the charge against the organization is false. That case is closed; that line of defense is taken away. The technique is one of guilt by association—one of the most odious institutions of history."

The Petitioner is not now attacking the constitutionality of the designations by the attorney general. The Petitioner is only contending that when a defendant is charged with belonging to one of the designated organizations the government must present some definition of what constitutes the designated organizations. The evil which is done where such definition is lacking is apparent in the case sought to be reviewed. The attorney general had designated several organizations containing the words "Ku Klux Klan" in their names as subversive (see Appendix B). The evidence showed that the John B. Gordon Klavern, of which it was charged the Petitioner was a member, was at one time associated with the Association of Georgia Klans, was then an independent orginzation, was then associated with the Southern Knights of the Ku Klux Klan, an organization not designated by the attorney general as subversive. No evidence was presented that the John B. Gordon Klavern was ever associated with any organization known as the Ku Klux Klan. Yet, the district judge instructed the jury that they could find that the

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John B. Gordon Klavern was a "Ku Klux Klan organization within the definition of any of the organizations designated by the attorney general". No standard, no definition, no limitations were imposed to restrict the determination of the jury. Thus, the words "Ku Klux Klan" became the guide. If the man belonged to any organization having the words "Ku Klux Klan" in their name, he could be found to be a member of an organization designated by the attorney general. This is not merely guilt by association. This is guilt by similarity of names.

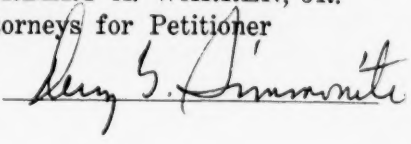
The Petitioner respectfully urges that this Court should delineate the degree of proof necesasry to establish that a certain organization is in fact the organization designated by the attorney general as subversive. This should be done by this Court because of the importance of such a point in enforcing and administering any Federal Employees Loyalty Program now in force or which may hereafter be adopted.

CONCLUSION

The Petitioner respectfully submits that the holding of the Court of Appeals for the Fifth Circuit is in conflict with applicable decisions of this Court and of other circuits and that there are questions of importance which have not been, but which should be settled by this Court in the case sought to be reviewed. The Petitioner respectfully submits that the judgment of the Court of Appeals for the Fifth Circuit should be reviewed and reversed by this Court.

Respectfully submitted,

HENRY G. SIMMONITE
HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
Attorneys for Petitioner

By 

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APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 14839

HARVEY GEORGE DeROSIER,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(January 18, 1955.)

Before HOLMES, BORAH, and RUSSELL, Circuit Judges.

HOLMES, Circuit Judge: Appellant was convicted on both counts of a two-count indictment charging violations of Section 1001 of Title 18, U. S. Code. This appeal challenges the jurisdiction and the venue of the court below, the sufficiency of the indictment to charge an offense, the substantiality of the evidence to support the verdict, and the correctness of the instructions under which the case was submitted to the jury.

The evidence shows that the Post Office Department Loyalty Board, acting on information to the effect that appellant was, or had recently been, a member of the J. B. Gordon Klavern of the Ku Klux Klan, issued to appellant, an employee of the Post Office Department, a "Notice of Proposed Removal Action,'" telling him that, because of his membership in and activity on behalf of the Klan organization, it had reasonable doubt as to his loyalty to the Government of the United States. He was advised of his right to answer the charges in writing within thirty days and to apply for an oral hearing at which he could be represented by counsel.

In response to this notice, appellant wrote a letter addressed to the Chairman of the Loyalty Board at Washington, D. C., in which he made certain false statements concerning his membership in the Ku Klux Klan. The letter was sworn to and signed in the presence of a notary public in the City of Hialeah, Florida, on August 18, 1951, and was sent from Florida to the Loyalty Board in Washington, D. C., where it was received two days later. To the letter was attached a copy of a letter purporting to have been written on May 1, 1950, and addressed to the Secretary of Sports, Inc., evidencing appellant's claim that he resigned from the Ku Klux Klan. Actually, this document was not what it purported to be, but was in fact a false writing or document fabricated by appellant to support his contention that he resigned from the Ku Klux Klan as soon as he realized that Sports, Inc., was merely a front for that organization.

The evidence shows further that appellant joined the J. B. Gordon Klavern of the Ku Klux Klan in April, 1950, and remained a member of that organization at least until

January, 1951. At the time appellant joined the Klavern, it was affiliated with the Association of Georgia Klans. This affiliation continued for a period of about four months after appellant became a member. The Ku Klux Klan and the Association of Georgia Klans are both contained in the Attorney General's list of subversive organizations.

The only substantial question presented is the one relating to the venue of the court being laid in the Southern District of Florida. The other issues, for the most part, are foreclosed by the record, the oral and documentary evidence, and the verdict of the jury. We have no doubt that the indictment was sufficient to charge offenses prohibited by the statute, and that the facts alleged therein were sufficient to advise appellant of the materiality of the false statements and the false document which he was accused of making and uttering. Neither are we in doubt as to the jurisdiction of the Loyalty Board to inquire into the past membership of appellant in an organization which, to say the least, was affiliated with a subversive organization named on the Attorney General's list at the time appellant became a member and for several months thereafter. Among the activities and associations of an employee which may be considered in connection with the determination of disloyalty may be one or more of the following:

> "(vi) Membership in affiliation with or sympathetic association with any foreign or domestic organization . . . designated by the attorney general as . . . having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their

rights under the Constitution of the United States." 5 C.F.R. (1949 Edition), Section 220.2(2).

The venue and jurisdictional questions are raised in two ways: First, appellant contends that no offense was committed until his letter was received by the Loyalty Board in Washington, D. C.; therefore, no offense triable in the Southern District of Florida has been charged or proven. Second, he contends that, even if proof that he prepared the letter in the Southern District of Florida and forwarded it from there would support venue and jurisdiction, the evidence is insufficient to show that he did actually forward the letter from that District. In answer to the first of these propositions, the Government relies upon 18 U. S. C. 3237, which provides that any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed. This would seem to be a complete answer to the contention. When the letter containing the false statements and the fabricated document was prepared and forwarded to the Loyalty Board, there was set in motion the events which culminated in the commission of the offenses charged. It would be an excess of literalism to say that the appellant was only preparing to commit the offense, and that the actual commission thereof had not in fact begun at the time and place from which the letter was sent, mailed, or forwarded, to the Board. It is no answer to say that, by some fortuitous circumstance, the consummation of the crime might have been frustrated by the loss of the letter in transit, thereby rendering ineffectual the attempt to deliver the false statements. Necessarily, the commission of the offense

must be viewed in retrospect. It is often not easy to draw a line between attempt and preparation; the former is such an intentional preparatory act as will apparently result, if not extrinsically prevented, in a crime which it was designed to effect.

In *United States v. Valenti*, 3rd Cir., 207 F. (2) 242, relied upon by appellant, the court held that, since the offense of filing a false affidavit with the National Labor Relations Board was not committed until the affidavit was received by the Labor Board, the offense was triable only in the district in which the affidavit was received. This ruling was based upon the technical ground that the Labor Board had no jurisdiction until the affidavit was "on file" with it. The court, citing and quoting from *United States v. Lombardo*, 241 U. S. 73, held further that, where the gist of the offense involves the filing of a document with a public official, the offense is committed at the place fixed for the filing, and is not a continuing offense commencing at the place from which the document is mailed. The Lombardo case involved an indictment returned in the Western District of the State of Washington, charging the offense of failing to file a report required to be filed in Washington, D. C. The Supreme Court held that the offense was committed and was indictable only in the place where the report was required to be filed, and not in the place where conditions existed which required the filing of such a report. The court, in that case, stated:

> "Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said

there is a continuously moving act commencing with the offender and hence ultimately consummated through him, as the mailing of a letter; . . ."

Again, at page 78, the court said: "For practical purposes it usually suffices to punish where the actor began or where the subject suffered the intended result." As we construe the Lombardo case, it does not require a conclusion different from that which we have reached. To the extent, if any, that our decision is at variance with the ruling in the Valenti case, the latter is distinguishable on its facts as indicated by the concurring opinion therein. 207 F. (2) 246.

The record shows that the letter written by appellant was addressed to the Chairman of the Loyalty Board at Washington, D. C., and was dated "August 18, 1951, Hialeah Post Office, Hialeah, Florida," within the Southern District of Florida. It was sworn to and subscribed before a notary public on that date and in that city. Appellant testified that he "sent" it to the Loyalty Board, and the receiving stamp placed on it by the Board shows that it was received by that agency two days after its date. We think that this evidence was sufficient to warrant the finding of the jury. implicit in its verdict under the instructions of the court, that the letter was transmitted to the Loyalty Board from the Southern District of Florida. Whether the letter was mailed or sent by some other agency, it is implicit in the verdict of the jury that, in addition to the signing and swearing to a false statement, the appellant put the false documents out of his possession and into some agency's custody for transmission to the Loyalty Board at Washington, D. C., all of

which was done by him in the Southern District of Florida. Consequently, the offense was begun in that district, and it became indictable either at the place of its beginning or at the place of its completion. In the Valenti case there was no proof of whether the false statement was mailed in the forum district or personally delivered in the filing district.

It follows from what we have said that the court did not err in refusing appellant's request to instruct the jury that the jurisdiction of the Loyalty Board depended upon a finding that appellant was a member of a listed organization at the time the inquiry was conducted, and in permitting the jury to find as a fact whether the J. B. Gordon Klavern was a Ku Klux Klan within the meaning of that name as listed by the Attorney General. Neither did the court err in refusing to instruct the jury that, in order to find appellant guilty, it was necessary for the false statements actually to be considered by the Board in reaching its decision, and for the Board to be misled by them. There is nothing in the statute which authorizes such a construction.

There being no reversible error in the record, the judgment appealed from is affirmed.

AFFIRMED.

Judge Russell sat during the oral argument of this case but, due to illness, took no part in this opinion.

A True copy:
Teste:

.....

Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Article 3 §2 Clause 3

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes have been committed."

18 U. S. C. 1001

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

5 C. F. R. (1949 Edition)

§220.2 Directive II;

"Initial consideration of loyalty cases — (a) Standard; activities and associations. (1) The standard for the refusal of employment or the removal from employment in an Executive Department or Agency on grounds relating to

loyalty under Executive Order 9835 as amended by Executive Order 10241 shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented."

* * *

(2) "Among the activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may be one or more of the following:

> (vi) Membership in, affiliation with or sympathetic association with any foreign or domestic organization . . . designated by the attorney general as . . . having adopted a policy of advocating or opposing the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States.

(7) In so far as an individual's membership in, affiliation with or sympathetic association with organizations is concerned, all Loyalty Boards shall confine their consideration to organizations on the attorney general's list."

* * *

(f) Action in cases of incumbent and excepted employees where initial consideration indicates that a finding of removal may be warranted. In all cases in which the evidence indicates that removal action may be warranted, the board shall serve the incumbent or excepted employee with a notice in writing stating the charges against him in factual detail, setting forth with particularity the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense or explanation, and of the proposed removal action.

(g) Contents of notice of proposed removal action. The notice of proposed removal action required in paragraph (f) of this section shall state to the employee:

* * *

(2) His right to answer the charges in writing under oath or affirmation, within a specified reasonable period of time, not less than ten (10) calendar days from the date of the receipt by the employee of the notice.

* * *

(h) Determination of case after notice.

* * *

(3) If the individual answers in writing but does not request a hearing, the board shall then consider the case on the complete file (including such answer), make its determination and notify the appropriate authority so that proper action may be taken."

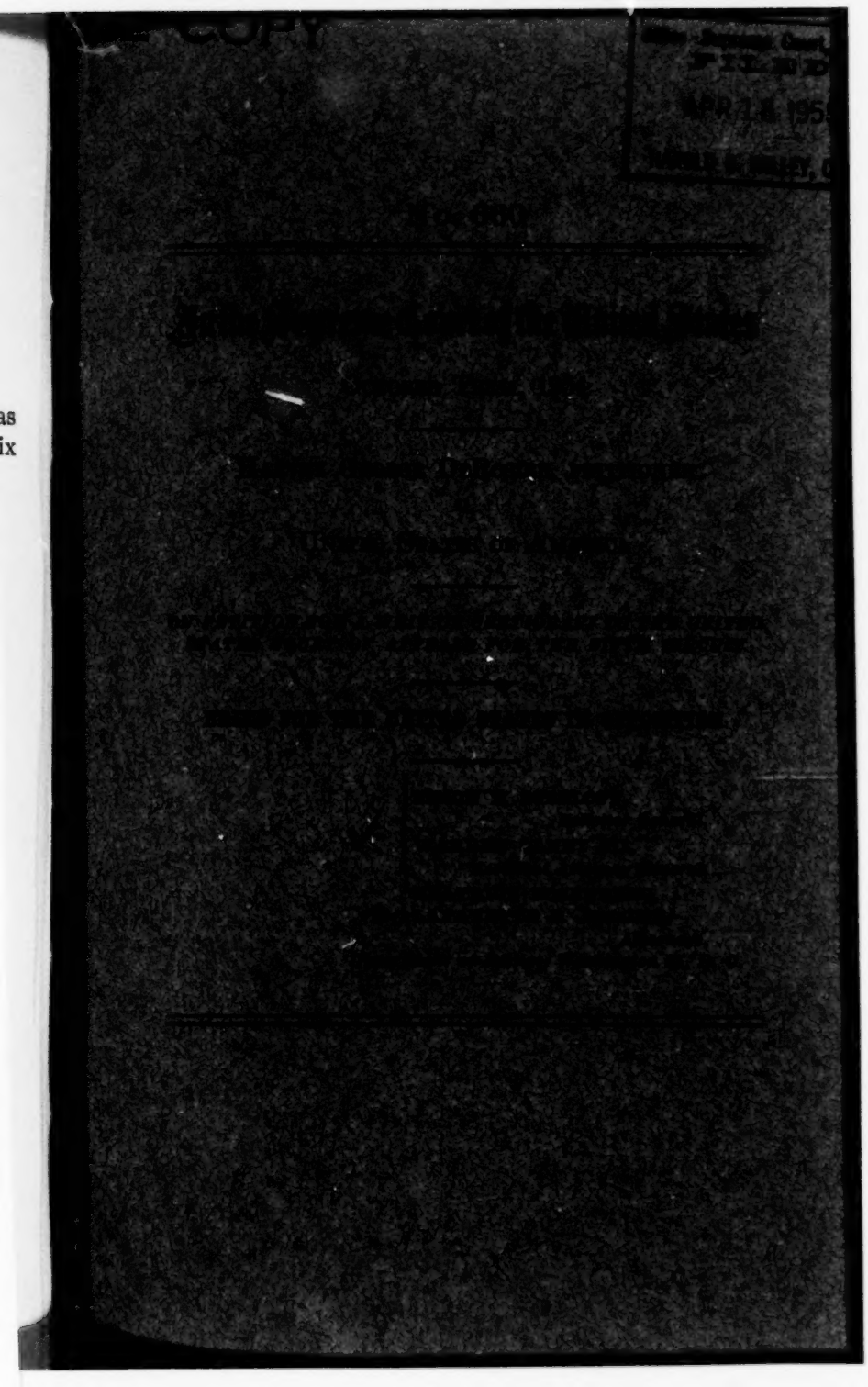
The designations of the attorney general, so far as pertinent to the present case, are set forth in Appendix A to 5 C. F. R. Part 210, to-wit:

"Organizations which have 'adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States.'

* * *

Associated Klans of America
Association of Georgia Klans
Ku Klux Klan
Original Southern Klans, Inc."

* * *



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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 660

HARVEY GEORGE DEROSIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 17–23) is reported at 218 F. 2d 420.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1955, and a petition for rehearing was denied on February 18, 1955. The petition for a writ of certiorari was filed on March 18, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, when false statements are prepared, sworn to and forwarded in one judicial district to a government department in another judicial district, the offense is commenced in one district and completed in another, so that it may be prosecuted in either district under 18 U. S. C. 3237.

2. Whether, in a prosecution for having made false statements to a federal loyalty board respecting charges that petitioner belonged to a specific Klavern, which was shown at the trial to have been associated with a specific Ku Klux Klan organization on the Attorney General's list for the federal employees' loyalty program, it was necessary for the court in instructing the jury to define the nature of the organizations on the list.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, of the Constitution provides, in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *.

The Sixth Amendment of the Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

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> trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

Title 18, U. S. C., Section 1001, provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Title 18, U. S. C., Section 3237, provides in pertinent part:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

* * * * *

STATEMENT

Petitioner, an employee of the United States Post Office Department, was convicted in the Southern District of Florida on both counts of a

two-count indictment charging violations of 18 U. S. C. 1001 (R. 12). He was sentenced to imprisonment for ninety days (R. 22–23). On appeal, the judgment was affirmed (Pet. 17–23).

1. The indictment alleged that petitioner was a Post Office employee subject to the jurisdiction of the Post Office Department Loyalty Board in its administration of the federal employees' loyalty program; that under this program membership in the Ku Klux Klan and various of its branches was one of the factors to be considered in determining loyalty; and that on July 12, 1951, a "Notice of Proposed Removal Action" was sent to petitioner which charged that from 1950 he had been a member of and held office in the J. B. Gordon Klavern of the Ku Klux Klan (R. 1–2). The first count charged that in his answer to this notice petitioner made false statements concerning his membership and activities in the John B. Gordon Klavern, which answer he had forwarded from Florida to the Loyalty Board (R. 3, 5). The second count charged that petitioner had attached to this answer a false document, knowing it contained false statements (R. 5–7). Petitioner's motion to dismiss the indictment, on the ground that the offense could be tried only in the District of Columbia (R. 8), was denied (R. 10–12).

The pertinent evidence may be summarized as follows:

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Pursuant to Executive Order 9835 the Attorney General of the United States had prepared a list of subversive organizations for the use of the various government departments, including the Post Office Department, in the administration of the loyalty program (Gov. Ex. 6; R. 60–61, 179–185). Included on this list were the Association of Georgia Klans, the Ku Klux Klan, the Original Southern Klans, Inc., and the Associated Klans of America (Gov. Ex. 6, R. 60, 185).

On July 12, 1951, the Post Office Department Loyalty Board forwarded to the petitioner a "Notice of Proposed Removal Action" (Gov. Ex. 2; R. 54–55, 161–164), which included specifications that:

> (1) From 1950 petitioner had been a member of the J. B. Gordon Klavern of the Ku Klux Klan and had been active in its affairs;
>
> (2) During his membership in the Ku Klux Klan he was in charge of assembling information concerning any person or organization opposed to the Klan;
>
> (3) In December 1950, at a regular meeting of the J. B. Gordon Klavern he had been elected to the office of Kludd (Chaplain) for this Klavern; and
>
> (4) He regularly attended meetings of the J. B. Gordon Klavern of the Ku Klux Klan.

The notice explained the procedures of the Board, stating, among other things, that peti-

tioner had a right to answer the charges and to have a hearing if desired. He was advised that his answer should be addressed to the Loyalty Board of the Post Office Department and sent to E. B. Jackson, Chairman, in Washington, D. C. (*Id.* at R. 163.)

On August 18, 1951, petitioner prepared an answer, in the form of a letter, addressed to Chairman Jackson, of the Post Office Department Loyalty Board, Room 4406, Post Office Department, Washington 25, D. C. (Gov. Ex. 3; R. 55–57, 165–168). The answer was sworn to before a Notary Public in Hialeah, Florida, on the same date (R. 68, 168). In it petitioner stated that in April 1950, he had joined an organization called Sports, Inc., that during the initiation ceremony he realized that Sports, Inc., was a Klan organization, that he immediately resigned, that he never attended any Klan meetings and never engaged in any of their undertakings whatsoever (R. 165–168). This was the document described in the first count of the indictment.

To support his claim that he had resigned as soon as he realized that he had joined a Klan organization, petitioner submitted with his answer a purported letter of resignation, dated May 1, 1950, directed to Sports, Inc. (Gov. Ex. 4; R. 57, 168–169), the body of which read as follows:

> Since becoming a member of Sports, Inc., I have every reason to believe that

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> your organization is in some way connected with the Ku Klux Klan, [sic] Had I known this before my initiation I would never have become a member.
>
> Therefore, you may accept this notice as my resignation from Sports, Inc., and any other organization you may represent including the Ku Klux Klan.

Petitioner admitted that he had rewritten the letter, which formed the basis of the second count, after he had received the "Notice of Proposed Removal Action" (R. 127–128).

Both documents were received by the Post Office Department Loyalty Board on August 20, 1951 (R. 58–59).

Petitioner admitted that he had sworn to and made a false statement to the Loyalty Board (R. 126–127), and that during the month of April 1950, he had joined the John B. Gordon Klavern (R. 124). At that time the Klavern was affiliated with the Association of Georgia Klans and was so affiliated for three or four months thereafter (R. 92). At a later date this Klavern became affiliated with the Southern Knights of the Ku Klux Klan (R. 79, 93). Petitioner attended meetings of the John B. Gordon Klavern (R. 74, 84, 94), was appointed and acted as librarian (R. 78, 97), was elected as Kludd (Chaplain) at a meeting on December 13, 1950 (R. 97, 98, 99), and was installed in this office at a meeting on January 10, 1951 (R. 101, 102).

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2. In its charge to the jury, the trial court stated, *inter alia,* that the Post Office Department Loyalty Board had jurisdiction to inquire only into petitioner's membership in organizations which had been designated by the Attorney General as subversive; that the list included Associat[ed] Klan of America, Association of Georgia Klans, Ku Klux Klan, and Original Southern Klans, Incorporated; that membership in any other organization than these four would be here immaterial; and that any false answers which petitioner may have made regarding membership in any other organization could not be a basis of guilt in this case (R. 155). The court thereupon stated (R. 156):

> The Court further charges the jury that if you find that the John B. Gordon Klavern mentioned in the indictment was a Ku Klux Klan organization within the definition of any of the organizations included in the Attorney General's list, as already mentioned to you, then the Board had jurisdiction to make a proper inquiry of the defendant concerning his membership in it.

As regards this part of the charge, petitioner noted an exception "to so much of the Court's instruction as instructed the jury that they could find that the John B. Gordon Klavern was a Klan organization within the meaning of the organizations designated by the Attorney General as being subversive" (R. 160).

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ARGUMENT

The decision below is clearly correct and is in complete harmony with the applicable decisions of both this Court and of the Circuits. No unresolved question of importance is raised and there is no occasion for further review. Petitioner's assertion of a conflict as regards the venue issue is without merit, since the cases on which he relies are properly distinguishable both on the facts and on the applicable law.

1. *The venue issue.*—This case was brought in Florida, where petitioner resided and was employed, and where he prepared and dispatched the false answer to the Loyalty Board in Washington, D. C. Every witness called by the government and by the defense in the trial of the case resided in Florida with the single exception of one government witness called from the Post Office Department in Washington to identify the pertinent documents from the official files (R. 51–65). Nevertheless, petitioner contends (Pet. 7–13) that the crimes with which he was charged could have been committed, within the meaning of the venue requirements, only at the place to which the answer was sent (i. e., Washington, D. C., 1,200 miles away) and hence that his motion to dismiss the indictment (R. 8) should have been granted. It is the government's position, which was sustained by both courts below, that the offense was commenced by the acts of the petitioner commit-

ted in the Southern District of Florida and completed by the filing of the false documents with the Post Office Department in Washington, and that therefore the offense could be tried in either district under 18 U. S. C. 3237, *supra*, p. 3.

Certainly, in a practical sense, when a false document is executed and forwarded from one district to be delivered in another, the crime has been commenced in the first district and completed in the second. The falsity which is the gist of the offense has been completed, the document has been sent on its way, and, except in the most extraordinary circumstances, the crime will be completed without anything further being done by the defendant. The situation is essentially the same as that where a shot fired in one district reaches its mark in another. Conceivably, after the shot is fired, some force may deflect it so that it never will reach its mark, just as it is possible that a letter may not be delivered. However, where the shot does reach its mark, or the letter does reach its destination, and the crime is completed, it is a crime which has been begun in one district and completed in another. By the shooting or the mailing, the defendant has done the last act which he can do.[1]

---

[1] It is unnecessary in this case to determine how far back beyond the point of transmission the commencement of the crime can be said to have begun. Cases cited by petitioner (Pet. 8–9) such as *Reass* v. *United States*, 99 F. 2d 752 (C. A. 4), and *United States* v. *Borow*, 101 F.

Such a construction makes it unnecessary, in cases of this character, to subject a defendant to the hardship of a trial in an environment alien to him, remote from his home and from appropriate facilities for his defense. It thus squarely accords with the spirit of Article III, Section 2, of the Constitution, as reinforced by the Sixth Amendment. As this Court said in *United States* v. *Johnson*, 323 U. S. 273, 276:

> Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. *If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even*

Supp. 211 (D. N. J.), holding that mere preparation of a document is not the commencement of the crime, are thus wholly inapposite. Whatever may be the correct rule as to acts of this character, where a defendant could have changed his mind and decided not to send the document, the situation is different where a letter is mailed and therefore the crime actually started on its way toward completion. *Wampler* v. *Snyder*, 66 F. 2d 195, 196 (C. A. D. C.), is also inapposite, for there the question at issue was whether the defendant, residing in Washington, D. C., could be tried in Maryland, the district where his tax return had to be filed. The court was not called upon to decide whether the petitioner in that case could also have been tried in Washington.

though not commanded by it. [Emphasis added.] [2]

In this case both the District Court and the Court of Appeals properly followed the mandate contained in *United States* v. *Johnson, supra,* and construed 18 U. S. C. 3237 in the direction of the constitutional policy for trial in the vicinage.

This construction is clearly supported by decisions of this Court. In *In re Palliser,* 136 U. S. 257, 265–266, and *Burton* v. *United States,* 202 U. S. 344, 381–388, this Court, although dealing with prosecution at the place of receipt, indicated that where corrupt proposals are made to government officials through the mail, the offense is subject to the dual venue statute as a crime commenced in one district and completed in another. Lower courts have likewise held that the dual venue statute applies where false documents are mailed, *Bridgeman* v. *United States,* 140 Fed. 577, 591 (C. A. 9); *United States* v. *Downey,* 257 Fed.

---

[2] See also *Hyde* v. *Shine,* 199 U. S. 62, 78, where the Court said:

"* * * But we do not wish to be understood as approving the practice of indicting citizens of distant States in the courts of this District, where an indictment will lie in the State of the domicil of such person, unless in exceptional cases where the circumstances seem to demand that this course shall be taken. To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship to which he ought not to be subjected, if the case can be tried in his own jurisdiction."

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366, 367 (D. R. I.); see also *United States* v. *Uram,* 148 F. 2d 187, 190 (C. A. 2). The Court of Appeals for the Fourth Circuit, which, in *Reass* v. *United States,* 99 F. 2d 752 (discussed in footnote 1, *supra,* p. 10) seemed inclined to the view that the offense of filing a false statement can be committed only in the district where the document must be filed, has held that where an offense, such as evading income taxes, involves more than mere filing, the offense can be commenced in the district where acts of concealment occur even though the return is required by law to be filed in another district. *Beaty* v. *United States,* 213 F. 2d 712, 715 (C. A. 4); see also *Newton* v. *United States,* 162 F. 2d 795, 796 (C. A. 4), certiorari denied, 333 U. S. 848. To the same effect see *United States* v. *United States District Court,* 209 F. 2d 575 (C. A. 6).

Petitioner's contention that the decision below is in conflict with *United States* v. *Lombardo,* 241 U. S. 73, fails to note that there the offense charged was the *failure to file* a document which the law required to be filed with the State Department in Washington, D. C.[3] Prosecution was

[3] Petitioner was here indicted under 18 U. S. C. 1001, which prohibits, *inter alia,* "knowingly and wilfully * * * mak[ing] false * * * statements" "in any matter within the jurisdiction of any department * * * of the United States". Thus, the offenses for which petitioner was found guilty, unlike an offense involving a mere *failure to file,* were "begun in one district and completed in another". 18 U. S. C. 3237.

attempted in the state where the defendant resided. The court held that "failure to file" was an offense which could be committed only at the place where the filing was required. It took pains, however, to make a distinction between such a case and one where some positive act is committed in a district other than the one in which the filing is required. In this connection the Court said, at p. 77:

> Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act commencing with the offender and hence ultimately consummated through him, as the mailing of a letter * * *.

See also *New York Central & H. R. R. Co.* v. *United States*, 166 Fed. 267, 270 (C. A. 2), where it was said:

> But the failure to file a rate schedule with the Interstate Commerce Commission is in no sense a continuous offense running into different districts. The offense consists in the failure to do a single act in a single place, to wit, to file a schedule in Washington. * * * The case is not at all analogous to the offense of presenting a false claim in one district which was prepared in another. There the unlawful preparation might well be considered an essential part of the unlawful presentation, and the com-

mission of the offense as having been commenced where the preparation took place.

Petitioner also contends that the decision below is in conflict with *United States* v. *Valenti*, 207 F. 2d 242 (C. A. 3). That case arose out of an affidavit filed with the National Labor Relations Board pursuant to Section 9 (h) of the Taft-Hartley Labor Management Relations Act, 61 Stat. 136, 146, 29 U. S. C. 159 (h), which provides that no investigation shall be made by the Labor Board unless the required affidavit "is on file with the Board." The court there held that since under the specific terms of that statute the Board had no jurisdiction over the subject matter until the affidavit was on file, the affidavit was not a matter within the jurisdiction of the Board until the filing was actually accomplished. Hence, jurisdiction would be only in the district where the affidavit was filed.

This case is wholly different from the *Valenti* case. Here the jurisdiction of the Loyalty Board did not depend upon the filing of an answer. The Board already had jurisdiction of the case and had exercised it by serving on petitioner the "notice of proposed removal action." The Board could have disposed of the case in the absence of an answer. This case is thus closer to the income tax evasion cases cited above than it is to *Valenti*.

2. *The jury charge issue.*—The "notice of proposed removal action" which was sent to peti-

tioner referred specifically to petitioner's membership from 1950 in the John B. Gordon Klavern, although describing it as a Klavern of the Ku Klux Klan (Gov. Ex. 2; R. 54–55, 161–164). Petitioner, in his answer, stated that he had belonged in 1950 to an organization called Sports, Inc., and had resigned therefrom as soon as he realized that it was a Klan organization, and that he had never attended any Klan meetings (Gov. Ex. 3; R. 55–57, 165–168). The answer, read together with the charges, can be interpreted only as a denial that petitioner ever belonged to the John B. Gordon Klavern. Under these circumstances, the falsity of petitioner's answer and of the accompanying document were sufficiently established by proof that he had taken an active part in the John B. Gordon Klavern (R. 94–99, 106–107, 129) and that he had rewritten the letter of resignation long after its purported date, and irrespective of his continued affiliation with the Klavern (R. 127–128). One who has given false answers to a government agency has no standing to question the authority of the agency to demand the information. "It does not lie with one knowingly making false statements with intent to mislead * * * to say that the statements were not influential or the information not important." *Kay* v. *United States,* 303 U. S. 1, 5–6; see also *United States* v. *Kapp,* 302 U. S. 214.

The court did, however, instruct the jury that the Loyalty Board "would have jurisdiction to make inquiry as to the membership of the defendant only in such organizations as had been designated by the Attorney General as subversive" (R. 155); that the Association of Georgia Klans, among others, was on that list (R. 155); and that in order for the Board to have jurisdiction, it must find that the John B. Gordon Klavern "was a Ku Klux Klan organization within the definition of any of the organizations included in the Attorney General's list, as already mentioned" (R. 156, see also R. 157–158). Petitioner's argument, that the court should have gone further and defined to the jury the nature of a Klan organization (Pet. 13–15), has no merit. We doubt that the issue of the Board's jurisdiction to make the inquiry was a matter to be submitted to the jury at all; it would seem to be, like the issue of materiality in a perjury prosecution, a question of law for the court. In any event, it was certainly enough to establish the jurisdiction of the Loyalty Board to make the inquiry that the Association of Georgia Klans was on the Attorney General's list, and that there was evidence the John B. Gordon Klavern belonged to the Association of Georgia Klans. It was therefore sufficient for the jury to be required to find that the Gordon Klavern belonged to one of the organizations on the Attorney General's list.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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